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Una Lee Jost
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File #611-01-N

September 24, 2013

VIA OVERNIGHT

Presiding Justice Joan Dempsey Klein and Associate Justices H. Walter Croskey
and Patti S. Kitching
California Court of Appeal
Second Appellate District, Division Three
Ronald Reagan State Office Building
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

Re: *Consumer Watchdog et al. v. California Department of Managed Health Care et al.*
2D Civ. No. B232338 (LASC Case No. BS121397)

Dear Presiding Justice Klein and Associate Justices Croskey and Kitching:

As you may recall, this office represents *amicus curiae* California Association for Behavior Analysis (CalABA) in the above-entitled matter. We are writing this letter brief in support of the petition of Plaintiffs, Appellants and Cross-Respondents Consumer Watchdog, et al. to express our grave concern regarding several errors in the Court's opinion regarding the practice of behavior analysis.

I. The Court Erred in Concluding that "Prior to the Enactment of the ABA Statute [SB 946], BACB-Certified Therapists Were Engaging in the Unlicensed Practice of Psychology."

Although no party made such an assertion nor were the parties afforded an opportunity to brief such an issue, the Court holds, on page 35 of the slip opinion, that "prior to the enactment of the ABA statute [SB 946], BACB-certified therapists were engaging in the unlicensed practice of *psychology*."

The Court cites to *Business and Professions Code* section 2093, which defines the practice of psychology:

> "*Business and Professions Code* section 2903 prohibits the practice of psychology without a license. 'The practice of psychology is defined as rendering or offering to render for a fee to individuals, groups, organizations or the public *any psychological service* involving *the application of psychological* principles, *methods*, and procedures of understanding, predicting, and *influencing behavior, such as the principles pertaining to learning*, perception, motivation, emotions, and interpersonal relationships; *and the methods and procedures of* interviewing, counseling, psychotherapy, *behavior modification*, and hypnosis; and of constructing, administering, and interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions, and motivations. *The application of these principles and methods includes*, but is not restricted to: diagnosis, prevention, *treatment*, and amelioration of psychological problems and emotional and *mental disorders* of individuals and groups.' (Emphasis added.)" (Slip Opn., pp. 32-22.)

The Court therefore concluded that "ABA involves the application of psychological methods to influence behavior, and can be considered a form of behavior modification" and that "[w]hen used as a treatment for autism, [ABA] therefore falls within the definition of psychology." (Slip Opn., p. 33.)

However, ABA is *not* the practice of "psychology," which is a separate and distinct discipline with different objectives, techniques, and training. The Court's conclusion is based on various mistaken assumptions including (i) that ABA involves application of "psychological" methods"; and (ii) that ABA may be considered a form of "behavior modification." Rather, (i) ABA involves application of behavior analytic methods instead of "psychological methods"; and (ii) "behavior modification" (as it is understood in the practice psychology) is outside the scope of ABA. ***In fact, Section 2903 never references "applied behavior analysis."***

Moreover, as set forth in this letter:

- The Court's opinion contradicts the determination of the California Department of Consumer Affairs, the agency charged with licensing and regulating the practice of psychology, which issued a written legal opinion in February 2000 specifically stating that behavioral analysis does *not* constitute the practice of psychology;

- The Court's opinion contradicts the text of the Title 17 regulations authorizing Behavior Analyst as a vendor category and adopting the BACB certification (permitting BACB-certified analysts to be contracted by the twenty-one Regional Centers throughout the State to provide services to people with developmental disabilities) which clearly distinguishes the functions of a psychologist from those of a behavior analyst a*nd explicitly prohibits behavior analysts from practicing psychology*;

- A comparison of the job analyses of ABA and the practice of psychology reveal that the behavior analyst occupation is *clearly distinguishable* from the practice of psychology with *very little overlap of functions* between the two professions; and

- The fact that the practice of ABA is a profession distinct and separate from the practice of psychology is reflected in the laws of the fourteen states to date that have adopted laws to license or certify behavior analysts, all of which regulate behavior analysts in a state agency other than the state's board of psychology or *in their own right* and not as psychologists.

A. The Court's opinion is based on the mistaken assumptions (i) that ABA involves application of "psychological" methods; and (ii) that ABA may be considered a form of "behavior modification."

1. ABA involves the application of "behavior analytic methods," instead of "psychological methods."

While the practice of psychology focuses on the *internal psyche*, the practice of ABA focuses on *external* environmental factors that influence *behavior*:

As explained by well-known behavior analyst Wayne W. Fisher, Ph.D., a board certified behavior analyst at the doctoral level (BCBA-D) and a licensed psychologist:

> "[t]he basic tenets that distinguish behavior analysis from other areas of psychology include its emphasis on (1) *behavior* as the basic datum for the field rather than the *psyche*, the self, or other internal mental or metaphysical structures or phenomena...."
> *(See* Fisher, et al., *Applied Behavior Analysis: History, Philosophy, Principles, and Basic Methods* in Handbook of Applied Behavior Analysis (Fisher, et al. Edits., (c) The Guildford Press) 3 (hereafter "ABA Handbook").

As described by Dr. Fisher, the above key distinction of ABA results in a practice that is significantly different from the practice of psychology:

> "A principal dimension is ABA's focus on direct observation, objective measurement, quantification, prediction, and control of *behavior* (Baer et al., 1968). Behavior analysts typically do not rely on indirect measures of behavior such as self-report, interviews, or checklists (Baer, Wolf, & Risley, 1987). In addition, they do not attribute behavior to characteristics of inner qualities, such as personality traits. Instead, they attempt to identify a function of the behavior by manipulating environmental events as independent variables and observing changes in behavior as the dependent variable." (*Id.* at 12.)

Therefore, ABA involves the application of "*behavior analytic* methods" instead of "psychological methods."

2. ABA cannot be considered a form of "behavior modification" as that term is understood in the practice of psychology.

In addition, ABA cannot be considered a form of "behavior modification" as that term is understood in the practice of psychology.

Merriam-Webster's Dictionary defines "behavior modification" as follows:

> ***"[P]sychotherapy*** that is concerned with the treatment (***as by desensitization or aversion therapy***) of observable behaviors rather than underlying psychological processes and that applies principles of learning to substitute desirable responses for undesirable ones (**as *phobias or obsessions***) —called also *behavioral therapy, behavior therapy."*
> (Merriam-Webster's Dictionary, Definition of BEHAVIOR MODIFICATION <http://www.merriam-webster.com/dictionary/behavior%20modification> (as of Sept. 22, 2013).)

In this case, the scope of ABA *expressly* excludes "psychotherapy...as [a] treatment modalit[y]." (*See* BACB's Model Act for Licensing/Regulating Behavior Analysts, Paragraph B.3, http://www.bacb.com/index.php?page=100285. (as of Sept. 22, 2013).

Consistent with this exclusion, ABA neither uses the psychotherapeutic treatment of "desensitization" nor "aversion therapy" to modify behavior; instead, ABA involves functional assessment and analysis to identify environmental factors of which behavior is a function, and the design, implementation, and evaluation of instructional and environmental modifications using "contextual factors, motivating operations, antecedent stimuli, positive reinforcement, and other consequences" to produce socially significant improvements in human behavior. (*Ibid.*)

Moreover, the treatment of "phobias or obsessions," which constitute anxiety disorders, are outside the scope of ABA. (*See, e.g.,* National Institute of Mental Health, Anxiety Disorders (listing social phobias and obsessive-compulsive disorders under the general category of anxiety disorders), http://www.nimh.nih.gov/health/topics/anxiety-disorders/index.shtml (as of Sept. 22, 2013); and BACB's Guidelines: Health Plan Coverage of Applied Behavior Analysis Treatment for Autism Spectrum Disorder, Ver. *1.1* (Copyright (c) 2012 by the Behavior Analyst Certification Board, Inc. 36 (identifying anxiety disorders as being outside the scope of ABA, http://www.bacb.com/index.php?page=100772 (as of Sept. 22, 2013).)

B. The Court's opinion contradicts the determination of the California Department of Consumer Affairs, the agency charged with licensing and regulating the practice of psychology, which issued a written legal opinion in February 2000 specifically stating that behavioral analysis does *not* constitute the practice of psychology.

The Court's opinion further contradicts the determination of the California Department of Consumer Affairs, the agency charged with licensing and regulating the practice of psychology, which issued a written legal opinion in February 2000 specifically stating that behavioral analysis does *not* constitute the practice of psychology. (*See* Don Chang, Supervising Counsel of the Cal. Dept. of Consumer Affairs, Letter to Cathy Barankin of Sacramento Advocacy (February 11, 2000)(hereafter "DCA opinion").)[1]

1 A true and correct copy of DCA's opinion is attached hereto as Exhibit 1. CalABA requests that the Court take judicial notice of DCA's opinion pursuant to *Evidence Code* section 452, subdivision (c) on the basis that this document is an "[o]fficial act of an executive department of the State of California."

This DCA opinion was issued just prior to the implementation of the Title 17 regulations (Cal. *Code Regs.*, tit. 17, § 54342) which added Behavior Analyt as a vendor category and adopted the BACB certification as a qualification for behavior analysts (*id.*, § 54342, subd. (a)(8) & (11)), permitting BACB-certified analysts to be contracted by the twenty-one Regional Centers throughout the State to provide services to people with developmental disabilities.

Specifically, the DCA noted the following distinguishing characteristics of ABA in reaching its conclusion that behavioral analysts were *not* engaged in the practice of psychology (*see* DCA opinion, *supra* at 2-3):

> "1. Behavioral analysts do not engage in diagnosing mental disorders or treating mental disorders, but focus on external environmental factors that influence behavior.
> 2. When Individual Education Plans (IEPs) are developed for children needing special education services, it is common for a licensed mental health professional to be on the evaluation team, providing those services requiring licensure.
> 3. While behavioral analysts are engaged in behavior modification, it is in a context and methodology different than that of psychologists and marriage, family and child counselors.
> 4. The term 'diagnosis' is not being used in its commonly understood medical or clinical sense. A more accurate term in this context is functional analysis.
> 5. Most importantly, when the issue is viewed from a strict legal perspective, it would appear extremely difficult to prosecute a behavioral analyst for engaging in the unlicensed practice of psychology or marriage, family and child counseling. Unlicensed practice is a crime. This means that licensing boards would be required to prove beyond a reasonable doubt that the person engaged in unlicensed practice. Given that the Department of Education has, at least implicitly, recognized and authorized the practice of behavioral analysts, and it has been practiced for some 30+ years, successful prosecution for unlicensed practice seems doubtful."

C. The Court's opinion contradicts the Title 17 regulations authorizing Behavior Analyst as a vendor category and adopting the BACB certification (permitting BACB-certified analysts to be contracted by the twenty-one Regional Centers throughout the State to provide services to people with developmental disabilities) which clearly distinguishes the functions of a psychologist from those of a behavior analyst *and explicitly prohibits behavior analysts from practicing psychology.*

The Court's opinion additionally contradicts the Title 17 regulations authorizing Behavior Analyst as a vendor category and adopting the BACB certification, permitting BACB-certified analysts to be contracted by the twenty-one Regional Centers throughout the State to provide services to people with developmental disabilities.

The Title 17 regulations clearly distinguish the functions of a psychologist from those of a behavior analyst. The description in the Title 17 regulations for the vendor category of behavior analysts is distinctly different from the vendor category for psychologists.[2] In addition, the text of the Title 17 regulations which authorized the vendor category for behavior analysts and adopts the BACB certification explicitly prohibit behavior analysts from practicing psychology:

> "(11) Behavior Analyst – Service Code 612. *Behavior Analyst means an individual who* assesses the function of a behavior of a consumer and designs, implements, and evaluates instructional and environmental modifications to produce socially significant improvements in the consumer's behavior through skill acquisition and the reduction of behavior. Behavior Analysts engage in functional assessments or functional analyses to identify environmental factors of which behavior is a function. ***A Behavior Analyst shall not practice psychology as defined in Business and Professions Code section 2903.*** *A regional center shall classify a vendor as a Behavior Analyst if an individual is recognized by the national Behavior Analyst Certification Board as a Board Certified Board Analyst."* (Cal. *Code Regs.* tit. 17, *§ 54342, subd. (a)(11).)*

2 *See* Cal. *Code Regs.*, tit. 17, § 54342, subd. (a)(17)(defining Clinical Psychologist).

D. The Behavior Analyst Profession is *Clearly Distinguishable* from the Psychology Profession With *Very Little Overlap in Functions* Between the Two Professions.

In California, the Legislature uses a "Sunrise Model" for the purpose of assessing requests for new or increased occupational regulation, pursuant to *Government Code* Section 9148 and policy Committee Rules. (*See* Cal. Senate Cmte. on Bus. and Prof. and Economic Development, Review of Occupational Regulation and the "Sunrise Model" Process, rev. 7/2011)[3] The model includes "a questionnaire and a set of evaluative scales to be completed by the group supporting regulation," the use of which "helps to ensure that regulatory mechanisms are imposed only when proven to be the most effective way of protecting the public, health, safety and welfare." (*Ibid.* at 1.)

Important concepts that were considered in development of California's "Sunrise Model," included the concept that "the public is best served by minimal governmental intervention," and that "the decision to regulate an occupation involves weighing the rights of individuals to do work of their choosing against the government's responsibility to protect the public when protection is clearly needed." (*Ibid.* at 2.)

Central to the Sunrise Model was the creation of nine Sunrise Criteria developed to provide a framework for evaluating the need for regulation, including the following Criteria #7: "The occupation is ***clearly distinguishable*** from other occupations that are already regulated." (*Ibid.*) With respect to this Criteria #7, the Legislature specifically considers whether there are "important occupational functions that are clearly different from those of currently regulated occupations." (*Ibid.* at 13.) A higher rating pointing towards significant public demand for regulation is given if there are important occupational functions that are clearly different from those of currently regulated occupations, and similar non-regulated groups do not perform critical functions included in this occupation's practice. Conversely, a lower rating pointing towards little need for regulation is given if there is a high degree of overlap with currently regulated occupations. (*Ibid.* at 12-13.)

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3 A true and correct copy of a Sunrise Model questionnaire CalABA recently received from the Legislature for completion is attached hereto as Exhibit 2. CalABA requests that the Court take judicial notice of DCA's opinion pursuant to *Evidence Code* section 452, subdivision (c) on the basis that this document is an "[o]fficial act of a legislative department of the State of California."

In fact, the behavior analyst occupation is clearly distinguishable from the practice of psychology with very little overlap of functions between the two professions. Comparing the resulting competencies of the most recent job analysis of the practice of psychology[4] with the most recent job analysis of the practice of behavior analysis[5] reveals almost no overlap in the practice of the two professions. The job analysis of the practice of psychology shows that training for licensure in psychology doesn't include behavior analysis, applied behavior analysis, or even behavior modification[6]; not surprisingly, none of these areas are listed in the major areas of practice for licensed psychologists.[7] Moreover, only 7% of U.S. Psychologists who responded to the job analysis indicated they have expertise in behavioral psychology[8] which does not include much, if any, expertise in behavior analysis because contemporary behavioral psychology is heavily cognitive rather than behavior analytic.

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4 *See* Greenberg, S., et all, Study of the Practice of Licensed Psychologists in the U.S. And Canada (© 2010 Association of State and Provincial Psychology Boards) (hereafter "ASPPB"), 95-104, tables 59-61 <http://www.asppb.net/i4a/pages/index.cfm?pageid=3580> (as of Sept. 13, 2013). The ASPPB is the alliance of boards responsible for the licensure and certification of psychologists in the United States and Canada.
A true and correct copy of excerpts of the ASPPB job analysis referenced in footnotes 6 through 8 of this letter brief is attached hereto as Exhibit 3. CalABA requests that the Court take judicial notice of the ASPPB excerpts pursuant to *Evidence Code* section 452, subdivision (h) on the basis that this document contains "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

5 *See* Behavior Analyst Certification Board, BCBA & BCaBA Behavior Analyst Task List <http://www.bacb.com/index.php?page=100248> (as of Sept. 13, 2013)(resulting from job analyses of the practice of ABA conducted by the BACB).

6 *See* ASPPB at 30, table 13.

7 *Ibid.* at 31, table 14.

8 *Ibid.* at 43, table 31.

E. The fact that the practice of ABA is a profession distinct and separate from the practice of psychology is reflected in the laws of the fourteen states to date that have adopted laws to license or certify behavior analysts, all of which regulate behavior analysts in a state agency other than the state's board of psychology or *in their own right* and not as psychologists.

The fact that the practice of ABA is a profession distinct and separate from the practice of psychology is further reflected in the laws of the fourteen states to date that have adopted laws to license or certify behavior analysts:

- Five states have independent behavior analyst licensing boards (Kentucky, Louisiana, Oklahoma, Oregon, and Rhode Island). Louisiana's licensure law explicitly states that "the distinction of a licensed behavior analyst [] is separate and apart from any other licensed individuals, including but not limited to psychologists."
- Two states license behavior analysts through its Board of Medicine (Virginia, Pennsylvania).
- One state will license behavior analysts through its Board of Registration of Allied Mental Health and Human Services Professions (Massachusetts).
- One state has no licensing board, but licenses behavior analysts directly through its Department of Safety and Professional Services (Wisconsin).
- Five states license or certify behavior analysts through its board of psychology; however, like all of the states listed above, these five states license or certify behavior analysts *in their own right*, and not as psychologists (Arizona, Missouri, North Dakota, Nevada, Ohio).

(*See* Behavior Analyst Certification Board, Behavior Analyst Licensure/Certification Statutes <http://www.bacb.com/index.php?page=100170> (as of Sept. 13, 2013).)

In *all fourteen* of the states to date where ABA is regulated, BACB certification is a qualification for state licensure or certification. (*Ibid.*)

II. Implications of the Court's Shocking Conclusion that "Prior to the Enactment of the ABA Statute [SB 946], BACB-Certified Therapists Were Engaging in the Unlicensed Practice of Psychology."

This determination by the Court of Appeal, in a published opinion that is binding on lower courts throughout the State of California, means that prior to January 1, 2012, when SB 946 took effect, BACB-certified ABA therapists were engaged in the unlawful practice of psychology – a *criminal* violation . (*See Bus. and Prof.* Code § 2970 ["Any person who violates any of the provisions of this chapter [California's Psychology Licensing Law] shall be guilty of a *misdemeanor* punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand dollars ($2,000), or by both]; s*ee, e.g., Peer v. Municipal Court* (1982) 128 Cal.App.3d 733, 736 (criminal process is available to control unlicensed practice of psychology); and *People v. Eckley* (1973) 33 Cal.App.3d 91, 95 (allegations that unlicensed person held herself out to be psychologist is sufficient to form basis of misdemeanor complaint).)

The Court reached this conclusion despite acknowledging that:

(i) ABA is the standard of care for treatment of autism;
(ii) BACB-certified therapists are indisputably recognized as proper practitioners of ABA ;
(iii) BACB-certified therapists have been providing ABA services for years in Regional Centers ;
(iv) the Department of Insurance required PPO plans within its jurisdiction to provide coverage for BACB-certified providers ;
(v) at least two health plans reached private agreements with DMHC to provide coverage for BACB-certified therapists prior to the enactment of SB 946 ;
(vi) there are not enough licensed individuals willing and able to provide ABA to all autistic children in need of ABA in California.

(*See* Court's slip opinion at pp. 13, 35-36.)[9]

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9 In addition, as CalABA noted on p. 24 of its amicus brief, in California, sixteen universities, *including eight California State University campuses and a University of California campus (Santa Barbara),* have submitted faculty applications and obtained BACB pre-approval of their university training as meeting BACB certification eligibility standards. *See* Behavior Analyst Certification Board, Approved University Training <http://www.bacb.com/index.php?page=100358> (as of September 22, 2013).

The implications of this shocking decision are unknown, but potentially calamitous for BACB-certified ABA therapists: For example:

-- Could a BACB-certified ABA therapist be prosecuted for violating the law prior to January 1, 2012?

-- Could individuals, insurers or health plans that still owe money to BACB-certified ABA therapists for services rendered prior to January 1, 2012, refuse to pay for those services based on the theory that the services were rendered illegally?

-- Could payors demand refunds of monies previously paid for such services based upon a similar theory?

III. The Court Erred In Concluding That SB 946 For The First Time Implicitly Authorized BACB-Certified Providers to Practice ABA (Instead Of Merely Confirming That BACB-Certified Analysts Have Always Been Qualified And Legally Entitled To Provide ABA Therapy to Autistic Children Without A License).

For all the reasons set forth above in Sections I and II, instead of holding that the Legislature's passage of SB 946 merely ***confirmed*** that BACB-certified analysts have always been qualified and legally entitled to provide ABA therapy to autistic children without a license, the Court held that SB 946 *for the first time* implicitly authorized BACB-certified providers to practice ABA. The implication of this ruling is that if SB 946, which is scheduled to expire on January 1, 2014, is not renewed, or if at any time in the future it were repealed or allowed to expire, *BACB-certified analysts would again be practicing ABA illegally*.

Moreover, SB 946 was an insurance coverage mandate for ABA, not a licensing statute or licensing exemption for ABA practitioners. It added provisions to the *Health and Safety* Code and the *Insurance* Code, not to the *Business and Professions* Code, which contains the statutes regulating the practice of medicine, psychology and the other healing arts. There is no suggestion in the legislative history of SB 946 that it was intended to create any licensing exemption or authorization for BACB-certified ABA analysts.

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For all the above reasons, CalABA respectfully urges this Court to reconsider its decision.

Respectfully submitted,

LAW OFFICE OF STEPHEN P. SOMMERS

By: _____
Una Lee Jost
Counsel for Amicus Curiae California Association for Behavior Analysis

Enclosures:

1. Don Chang, Supervising Counsel of the Cal. Dept. of Consumer Affairs, Letter to Cathy Barankin of Sacramento Advocacy (February 11, 2000).
2. Cal. Senate Cmte. on Bus. and Prof. and Economic Development, Review of Occupational Regulation and the "Sunrise Model" Process, rev. 7/2011.
3. Greenberg, S., et al, Study of the Practice of Licensed Psychologists in the U.S. and Canada (© 2010 Association of State and Provincial Psychology Boards) 30-31, 43, tables 13-14, 31.

cc: Attached service list.

EXHIBIT 1

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY GRAY DAVIS, Governor

Consumer Affairs

LEGAL AFFAIRS
400 R STREET, SUITE 3080
SACRAMENTO, CA 95814-6200

(916) 445-4216

February 11, 2000

CATHY BARANKIN
Sacramento Advocacy
2220 Capitol Advocacy
Sacramento, CA 95816

Re: **Behavioral Analysts**

Dear Ms. Barankin: Cathy

This is in response to your request that I memorialize in writing, a presentation and legal opinion relating to behavioral analysts that I offered at a meeting at the Department of Education in January of 1997. In that presentation I concluded that behavioral analysts, practicing as described, are not required to be licensed as psychologists or marriage, family and child counselors (now marriage and family therapists). LaVonne Powell, who serves as legal counsel to the Board of Behavioral Sciences, and who also attended that meeting, concurred in the opinion. I apologize that the press of business in our office precluded my getting this to you earlier.

The following memorializes the presentation, which included a history of the Department of Consumer Affairs (DCA) involvement in the matter.

DCA's involvement began in the latter part of 1996 when the department was asked to respond to a series of questions relating to implementation of SB 989 (1996) by the Department Education. At that time, Greg Hudson was a Special Project Consultant with the Department of Education and was responsible for formulating the implementing regulations. Mr. Hudson was working with a group of interested parties, called the "SB 989 Work Group," on the regulations.

In early November of 1996, Mr. Hudson met with representatives of DCA and provided information on the context and background of SB 989. Subsequent to that meeting, he provided information to the DCA Legal Office regarding what behavioral analysts actually do, in the form of a training manual from one of the firms which contracted with school districts to provide these services. There were several telephone conversations to clarify certain issues. The initial, preliminary review by the Legal Office indicated that some of the activities of behavioral analysts constituted the practice of psychology, and some activities bordered on the practice of medicine. The training manual described a major component of their activities as behavioral diagnosis, which, in part, included determining that a child's aberrant behavior may be the result of illness or a reaction to medication. We provided Mr. Hudson with a copy of pertinent provisions of the Psychology License law, a summary of an Attorney General's opinion, and a summary of a case entitled Magit v. Board of Medical Examiners.

In early December 1996, a second meeting was then held with Mr. Hudson to discuss the issues.

Based on our discussions at that December meeting, Mr. Hudson sent a letter to the SB 989 Work Group, indicating that the preliminary opinion of the Legal Office, based solely on the information reviewed, was that some of the activities in which behavioral analysts engaged constituted the practice of psychology. The letter also requested any input the behavioral analysts wished to submit, and requested that it be submitted some two weeks prior to Legal Office attorneys Dan Buntjer and LaVonne Powell attending a meeting of the SB 989 Work Group, scheduled for January 30, 1997.

Significant and valuable input was provided by a number of interested parties and the Legal Office attorneys reviewed the information. The thrust of the information and argument was that behavioral analysts were not practicing psychology and, therefore, were not required to be licensed.

In mid-January, on behalf of the behavioral analysts, you requested a meeting with the Legal Office attorneys. On January 27, the undersigned and LaVonne Powell met with you, Greg Wagner, a licensed psychologist and behavioral analyst who works for the Department of Developmental Services, and Mark Levine, a behavioral analyst and co-owner of the Behavioral Counseling and Research Center. Dr. Wagner made it clear he was at the meeting solely in his private capacity and not as a representative of DDS. There was further extensive discussion of the actual practices of behavioral analysts. At this meeting, you indicated that legislation would be introduced to statutorily recognize behavioral analysts.

On January 30, 1997, the undersigned and LaVonne Powell attended a meeting of the SB 989 Work Group. We presented the above-noted chronological history of DCA's involvement in the regulatory process and our legal approach to analyzing the licensing issue that had arisen.

We advised the SB 989 Work Group that after review of all the information submitted, and the clarification of various matters through discussion and input, it was our legal opinion that behavioral analysts, performing as represented to us, were not engaged in the practice of psychology or marriage, family and child counseling (now marriage and family therapy).

The following information and analysis changed our preliminary conclusion.

1. Behavioral analysts do not engage in diagnosing mental disorders or treating mental disorders, but focus on external environmental factors that influence behavior.

2. When Individual Education Plans (IEPs) are developed for children needing special education services, it is common for a licensed mental health professional to be on the evaluation team, providing those services requiring licensure.

3. While behavioral analysts are engaged in behavior modification, it is in a context and methodology different than that of psychologist and marriage, family and child counselors.

4. The term "diagnosis" is not being used in its commonly understood medical or clinical sense. A more accurate term in this context is functional analysis.

5. Most importantly, when the issue is viewed from a strict legal perspective, it would appear extremely difficult to prosecute a behavioral analyst for engaging in the unlicensed practice of psychology or marriage, family and child counseling. Unlicensed practice is a crime. This means that licensing boards would be required to prove beyond a reasonable doubt that the person engaged in unlicensed practice. Given that the Department of Education has, at least implicitly, recognized and authorized the practice of behavioral analysts, and it has been practiced for some 30+ years, successful prosecution for unlicensed practice seems doubtful.

I trust the foregoing is responsive to your request. If you have any questions, or need to further discuss the foregoing, please feel free to contact me at your convenience.

Sincerely,

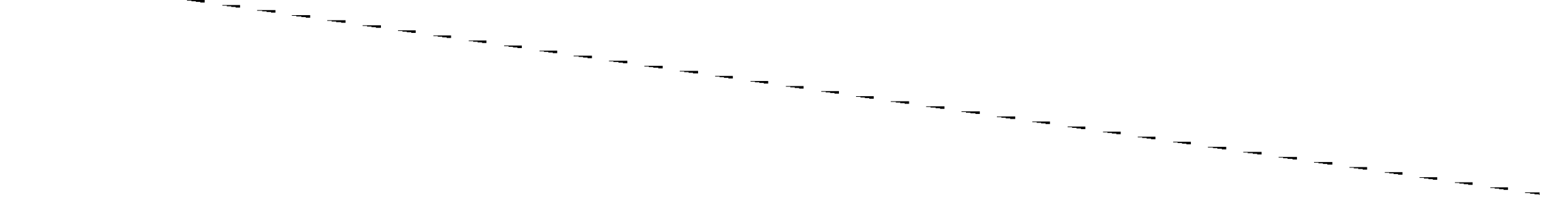
DON CHANG
Supervising Counsel

Daniel Buntjer

By DANIEL BUNTJER
Senior Staff Counsel

cc: Tom O'Connor, EO, Board of Psychology
Sherry Mehl, EO, Board of Behavioral Sciences
LaVonne Powell, Staff Counsel

EXHIBIT 2



REVIEW OF OCCUPATIONAL REGULATION AND THE "SUNRISE MODEL" PROCESS

The "Sunrise Model"

The Legislature uses a "Sunrise Model" for the purpose of assessing requests for new or increased occupational regulation, pursuant to Government Code Section 9148 and policy Committee Rules. The model includes a questionnaire and a set of evaluative scales to be completed by the group supporting regulation. The model is an objective tool for collecting and analyzing information needed to arrive at accurate, informed, and publicly supportable decisions regarding the merits of regulatory proposals.

Use of this model accomplishes the following: (1) places the burden of showing the necessity for new regulations on the requesting groups; (2) allows the systematic collection of opinions both pro and con; and, (3) documents the criteria used to decide upon new regulatory proposals. This helps to ensure that regulatory mechanisms are imposed only when proven to be the most effective way of protecting the public health, safety and welfare.

Background

Legislators and committees of the Senate and Assembly receive requests for new or expanded occupational regulation each Legislative Session. The regulatory proposals are intended to assure the competence of specified practitioners in different occupations. These requests in the past resulted in a proliferation of licensure and certification programs – a proliferation that met with mixed reviews. Proponents argue that licensing benefits the public by assuring competence and an avenue for consumer redress. Critics disturbed by increased governmental intervention in the marketplace have cited shortages of practitioners and increased costs of service as indicators that regulation benefits a profession more than it benefits the public.

State legislators and administrative officials are expected to weigh arguments regarding the necessity of such regulation, determine the appropriate level of regulation (e.g., registration, certification or licensure), and select a set of standards (education, experience, examinations) that will assure competency. Requests for regulatory decisions often result in sharp differences of opinion as supporters and critics of the proposed regulation present their arguments. The need for accurate information is clear and universal; however, no system existed to ensure that all needed information is collected and that the arguments presented are objectively weighed.

To create such a system, the Legislature and the state Department of Consumer Affairs undertook to develop ways of assessing needs for examinations, educational standards, and experience requirements that would assure provider competence in non-health-related occupations. The results of this project resulted in an evaluative model designed to provide a uniform basis for the presentation and review of proposed occupational regulation. This "Sunrise Model" comprises a questionnaire and evaluative scales that allow systematic collection and analysis of the data required for decisions about new regulation.

Developing the "Sunrise Model"

Several important concepts were considered in development of this model. The first is that the public is best served by minimal governmental intervention. Therefore, the group seeking regulation should be responsible for showing that government oversight is needed to protect the public health, safety or welfare.

Second, the decision to regulate an occupation involves weighing the right of individuals to do work of their choosing against the government's responsibility to protect the public when protection is clearly needed. Therefore, regulation should encompass fairness to consumers and practitioners alike.

Third, the instruments derived from this project should in no way deter small or poorly funded groups from making legitimate requests for regulation. Though it is true, for example, that requests for regulation come most often from professional associations, concerned citizens also propose new statutes. Usually such individuals will be less than able to provide extensive statistics and documentation in support of their proposal. It is imperative in such cases to ensure that form does not triumph over substance, i.e., that well-grounded concerns are not held hostage to formal completion of a data-collection process.

The development of the Sunrise Model began with an exploration of current regulatory practice in other jurisdictions. Several sources were found that indicate a nationwide, ongoing effort to develop criteria that determine whether a need for regulation exists and, if it does, the level of regulation needed.

Especially helpful were the Bateman Commission report to the New Jersey Legislature, Minnesota's Allied Health Credentialing Act, the Council of State Governments' publication **"Occupational Licensing: Questions a Legislator Should Ask,"** and documents from Washington's Department of Licensing. Each of these sources provided ideas and information that have been integrated into the project products.

Sunrise Criteria and the Evaluative Questionnaire

Central to the Sunrise Model was the creation of nine Sunrise Criteria developed to provide a framework for evaluating the need for regulation. These criteria are:

1. Unregulated practice of the occupation in question will harm or endanger the public health, safety or welfare.
2. Existing protections available to the consumer are insufficient.
3. No alternatives to regulation will adequately protect the public.
4. Regulation will alleviate existing problems.
5. Practitioners operate independently, making decisions of consequence.
6. The functions and tasks of the occupation are clearly defined.
7. The occupation is clearly distinguishable from other occupations that are already regulated.
8. The occupation requires knowledge, skills and abilities that are both teachable and testable.
9. The economic impact of regulation is justified.

The Sunrise Criteria were designed to present a concise statement of conditions indicative of a need for regulation. They were used to develop a "Regulatory Request Questionnaire" that solicits responses to a comprehensive, clearly defined set of questions. These questions allow presentation of arguments regarding the merits of the proposed regulation. The Questionnaire is intended as an aid to legislative and administrative staff, who should supply it to proponents of new regulations. (It can also be provided to those opposing such regulations.) In this way, the burden of proving the need for new regulations rests with the requesting groups.

The Questionnaire has three sections:

Section A helps identify the group seeking regulation and helps determine whether the applicant group adequately represents the occupation.

Section B will identify (1) consumers who typically seek practitioner services, and (2) non-applicant groups with an interest in the proposed regulation.

Section C has two parts: Part 1 allows presentation of data that support the application for regulation. Questions in this section, organized under the nine Sunrise Criteria, require the applicant group to identify the current problems associated with unregulated practice of the occupation, show how the proposed regulation would solve those problems, and estimate the costs of implementing it. Part 2 requires the applicant group to complete a self-rating on each of the Sunrise Criteria. These rating scales allow quantitative evaluation of the information and arguments concerning each important aspect of the proposed regulation. Examples of low and high ratings help clarify and standardize the criteria.

Procedure for Submitting Questionnaire

The "Regulatory Request Questionnaire" should be completed prior to introduction of a bill, and accompanied by a cover letter that provides information helpful to committee staff and other interested parties. At minimum, the letter should include: (1) a brief overview of the proposal; (2) the name of the person to contact for additional information; and (3) a comment on whether the proponents intend to pursue introduction of legislation in the current year or two-year session, and, if so, the intended author of the legislation.

Once the applicant group has completed the Questionnaire, legislative staff and other interested parties (e.g., staff of the appropriate state agency or agencies) will review and evaluate the information provided. While the Questionnaire will generate information useful in several contexts, its main purpose is to provide proponents and Legislative staff with comprehensive information in a common format and thereby facilitate informed decision making.

The model should help administrators and legislators answer three basic questions:

1. Does the proposed regulation benefit the public health, safety or welfare?

2. Will the proposed regulation be the most effective way to correct existing problems?

3. Is the level of the proposed regulation appropriate?

Determination of the Level of Regulation Needed

If review of the proponents' case indicates that regulation is appropriate, a determination must be made regarding the appropriate level of regulation. As noted above, the public is best served by minimal government intervention. The definitions and guidelines below are intended to facilitate selection of the least restrictive level of regulation that will adequately protect the public interest.

Level I: Strengthen existing laws and controls. The choice may include providing stricter civil actions or criminal prosecutions. It is most appropriate where the public can effectively implement control.

Level II: Impose inspections and enforcement requirements. This choice may allow inspection and enforcement by a state agency. These should be considered where a service is provided that involves a hazard to the public health, safety, or welfare. Enforcement may include recourse to court injunctions, and should apply to the business or organization providing the service, rather than the individual employees.

Level III: Impose registration requirements. Under registration, the state maintains an official roster of the practitioners of an occupation, recording also the location and other particulars of the practice, including a description of the services provided. This level of regulation is appropriate where any threat to the public is small.

Level IV: Provide opportunity for certification. Certification is voluntary; it grants recognition to persons who have met certain prerequisites. Certification protects a title: non-certified persons may perform the same tasks but may not use "certified" in their titles. Usually an occupational association is the certifying agency, but the state can be one as well. Either can provide consumers a list of certified practitioners who have agreed to provide services of a specified quality for a stated fee. This level of regulation is appropriate when potential for harm exists and when consumers have substantial need to rely on the services of practitioners.

Level V: Impose licensure requirements. Under licensure, the state allows persons who meet predetermined standards to work at an occupation that would be unlawful for an unlicensed person to practice. Licensure protects the scope of practice and the title. It also provides for a disciplinary process administered by a state control agency. This level of regulation is appropriate only in those cases where a clear potential for harm exists and no lesser level of regulation can be shown to adequately protect the public.

SENATE COMMITTEE ON BUSINESS PROFESSIONS AND ECONOMIC DEVELOPMENT

REGULATORY REQUEST QUESTIONNAIRE

Instructions for completing this questionnaire

- Responses to this questionnaire should be typed and dated. Each question should be answered within a single main document, which is limited to 50 pages. Supporting evidence for your responses may be included as an *Appendix*, but all essential information should be included within the main document.

- Each question from the questionnaire should be stated in upper case (capital) letters. The response should follow in lower case letters.

- Each part of every question must be addressed. If there is no information available to answer the question, state this as your response and describe what you did to attempt to find information that would answer the question. If you think the question is not applicable, state this and explain your response.

- When supporting documentation is appropriate, include it as an *Appendix*. Appendices would be labeled as follows: Each document appended should be lettered in alphabetical order. Pages within each appendix should be numbered sequentially. For example, the third page of the first appendix will be labeled A3, and the fifth page of the second appendix will be labeled B5. References within the main document to information contained in Appendices should use these page labels.

- Please read the entire questionnaire before answering any questions so that you will understand what information is being requested and how questions relate to each other.

Section A: Applicant Group Identification

This section of the questionnaire is designed to help identify the group seeking regulation and to determine if the applicant group adequately represents the occupation.

1. What occupational group is seeking regulation? Identify by name, address and associational affiliation the individuals who should be contacted when communicating with this group regarding this application.

2. List all titles currently used by California practitioners of this occupation. Estimate the total number of practitioners now in California and the number using each title.

3. Identify each occupational association or similar organization representing current practitioners in California, and estimate its membership. For each, list the name of any associated national group.

4. Estimate the percentage of practitioners who support this request for regulation. Document the source of this estimate.

5. Name the applicant group representing the practitioners in this effort to seek regulation. How was this group selected to represent practitioners?

6. Are all practitioner groups listed in response to question 2 represented in the organization seeking regulation? If not, why not?

Section B: Consumer Group Identification

This section of the questionnaire is designed to identify consumers who typically seek practitioner services and to identify nonapplicant groups with an interest in the proposed regulation.

7. Do practitioners typically deal with a specific consumer population? Are clients generally individuals or organizations? Document.

8. Identify any advocacy groups representing California consumers of this service. List also the name of applicable national advocacy groups.

9. Identify any consumer populations not now using practitioner services likely to do so if regulation is approved.

10. Does the applicant group include consumer advocate representation? If so, document. If not, why not?

11. Name any non-applicant groups opposed to or with an interest in the proposed regulation. If none, indicate efforts made to identify them.

Section C: Sunrise Criteria

This part of the questionnaire is intended to provide a uniform method for obtaining information regarding the merits of a request for governmental regulation of an occupation. The information you provide will be used to rate arguments in favor of imposing new regulations (such as educational standards, experience requirements, or examinations) to assure occupational competence.

Part C1 – Sunrise Criteria and Questions

The following questions have been designed to allow presentation of data in support of application for regulation. Provide concise and accurate information in the form indicated in the *Instructions* portion of this questionnaire.

I. UNREGULATED PRACTICE OF THIS OCCUPATION WILL HARM OR ENDANGER THE PUBLIC HEALTH SAFETY AND WELFARE

12. Is there or has there been significant public demand for a regulatory standard? Document. If not, what is the basis for this application?

13. What is the nature and severity of the harm? Document the physical, social, intellectual, financial or other consequences to the consumer resulting from incompetent practice.

14. How likely is it that harm will occur? Cite cases or instances of consumer injury. If none, how is harm currently avoided?

15. What provisions of the proposed regulation would preclude consumer injury?

II. EXISTING PROTECTIONS AVAILABLE TO THE CONSUMER ARE INSUFFICIENT

16. To what extent do consumers currently control their exposure to risk? How do clients locate and select practitioners?

17. Are clients frequently referred to practitioners for services? Give examples of referral patterns.

18. Are clients frequently referred elsewhere by practitioners? Give examples of referral patterns.

19. What sources exist to inform consumers of the risk inherent in incompetent practice and of what practitioner behaviors constitute competent performance?

20. What administrative or legal remedies are currently available to redress consumer injury and abuse in this field?

21. Are the currently available remedies insufficient or ineffective? If so, explain why.

III. NO ALTERNATIVES TO REGULATION WILL ADEQUATELY PROTECT THE PUBLIC

22. Explain why marketplace factors will not be as effective as governmental regulation in ensuring public welfare. Document specific instances in which market controls have broken down or proven ineffective in assuring consumer protection.

23. Are there other states in which this occupation is regulated? If so, identify the states and indicate the manner in which consumer protection is ensured in those states. Provide, as an appendix, copies of the regulatory provisions from these states.

24. What means other than governmental regulation have been employed in California to ensure consumer health and safety. Show why the following would be inadequate:
    a. code of ethics
    b. codes of practice enforced by professional associations
    c. dispute-resolution mechanisms such as mediation or arbitration
    d. recourse to current applicable law
    e. regulation of those who employ or supervise practitioners
    f. other measures attempted

25. If a "grandfather" clause (in which current practitioners are exempted from compliance with proposed entry standards) has been included in the regulation proposed by the applicant group, how is that clause justified? What safeguards will be provided consumers regarding this group?

IV. REGULATION WILL MITIGATE EXISTING PROBLEMS

26. What specific benefits will the public realize if this occupation is regulated? Indicate clearly how the proposed regulation will correct or preclude consumer injury. Do these benefits go beyond freedom from harm? If so, in what way?

27. Which consumers of practitioner services are most in need of protection? Which require least protection? Which consumers will benefit most and least from regulation?

28. Provide evidence of "net" benefit when the following possible effects of regulation are considered:
    a. restriction of opportunity to practice
    b. restricted supply of practitioners
    c. increased costs of service to consumer
    d. increased governmental intervention in the marketplace.

V. PRACTITIONERS OPERATE INDEPENDENTLY, MAKING DECISIONS OF CONSEQUENCE

29. To what extent do individual practitioners make professional judgments of consequence? What are these judgments? How frequently do they occur? What are the consequences? Document.

30. To what extent do practitioners work independently (as opposed to working under the auspices of an organization, an employer or a supervisor)?

31. To what extent do decisions made by the practitioner require a high degree of skill or knowledge to avoid harm?

VI. FUNCTIONS AND TASKS OF THE OCCUPATION ARE CLEARLY DEFINED

32. Does the proposed regulatory scheme define a scope of activity which requires licensure, or merely prevent the use of a designated job title or occupational description without a license?

33. Describe the important functions, tasks and duties performed by practitioners. Identify the services and/or products provided.

34. Is there a consensus on what activities constitute competent practice of the occupation? If so, state and document. If not, what is the basis for assessing competence?

35. Are indicators of competent practice listed in response to *Question 34* measurable by objective standards such as peer review? Give examples.

36. Specify activities or practices that would suggest that a practitioner is incompetent. To what extent is public harm caused by personal factors such as dishonesty? Document.

VII. THE OCCUPATION IS CLEARLY DISTINGUISHABLE FROM OTHER OCCUPATIONS THAT ARE ALREADY REGULATED

37. What similar occupations have been regulated in California?

38. Describe functions performed by practitioners that differ form those performed by occupations listed in *Question 37*.

39. Indicate the relationships among the groups listed in response to *Question 37* and practitioners. Can practitioners be considered a branch of currently regulated occupations?

40. What impact will the requested regulation have upon the authority and scopes of practice of currently regulated groups?

41. Are there unregulated occupations performing services similar to those of the group to be regulated? If so, identify.

42. Describe the similarities and differences between practitioners and the groups identified in *Question 41*.

VIII. THE OCCUPATION REQUIRES POSSESSION OF KNOWLEDGES, SKILLS AND ABILITIES THAT ARE BOTH TEACHABLE AND TESTABLE

43. Is there a generally accepted core set of knowledges, skills and abilities without which a practitioner may cause public harm? Describe and document.

44. What methods are currently used to define the requisite knowledges, skills and abilities? Who is responsible for defining these knowledges, skills and abilities?

45. Are these knowledges, skills and abilities testable? Is the work of the group sufficiently defined that competence could be evaluated by some standard (such as ratings of education, experience or exam performance)?

46. List institutions and program titles offering accredited and nonaccredited preparatory programs in California. Estimate the annual number of graduates from each. If no such preparatory programs exist within California, list programs found elsewhere.

47. Apart from the programs listed in *Question 46*, indicate various methods of acquiring requisite knowledge, skill and ability. Examples may include apprenticeships, internships, on-the-job training, individual study, etc.

48. Estimate the percentage of current practitioners trained by each of the routes described in *Questions 46-47*.

49. Does any examination or other measure currently exist to test for functional competence? If so, indicate how and by whom each was constructed and by whom it is currently administered. If not, indicate search efforts to locate such measures.

50. Describe the format and content of each examination listed in *Question 49*. Describe the sections of each examination. What competencies is each designed to measure? How do these relate to the knowledges, skills and abilities listed in *Question 43*?

51. If more than one examination is listed above, which standard do you intend to support? Why? If none of the above, why not, and what do you propose as an alternative?

IX. ECONOMIC IMPACT OF REGULATION IS JUSTIFIED

52. How many people are exposed annually to this occupation? Will regulation of the occupation affect this figure? If so, in what way?

53. What is the current cost of the service provided? Estimate the amount of money spent annually in California for the services of this group. How will regulation affect these costs? Provide documentation for your answers.

54. Outline the major governmental activities you believe will be necessary to appropriately regulate practitioners. Examples may include such program elements as: qualifications evaluation, examination development or administration, enforcement, school accreditation, etc.

55. Provide a cost analysis supporting regulatory services to this occupation. Include costs to provide adequate regulatory functions during the first three years following implementation of this regulation. Assure that at least the following have been included:
    a. costs of program administration, including staffing
    b. costs of developing and/or administering examinations
    c. costs of effective enforcement programs

56. How many practitioners are likely to apply each year for certification if this regulation is adopted? If small numbers will apply, how are costs justified?

57. Does adoption of the requested regulation represent the most cost-effective form of regulation? Indicate alternatives considered and costs associated with each.

Part C2 – Rating on Sunrise Criteria

Assign each Criterion a numeric rating of 0–5 in the space provided. The rating should be supported by the answers provided to the questions in *Part C1*. Scale descriptions are intended to give examples of characteristics indicative of ratings.

0_____1_____2_____3_____4_____5
(*Little Need for Regulation*) LOW HIGH (*Great Need for Regulation*)

I. UNREGULATED PRACTICE OF THIS OCCUPATION WILL HARM OR ENDANGER THE PUBLIC HEALTH SAFETY AND WELFARE _____

low: Regulation sought only by practitioners. Evidence of harm lacking or remote. Most effects secondary or tertiary. Little evidence that regulation would correct inequities.

high: Significant public demand. Patterns of repeated and severe harm, caused directly by incompetent practice. Suggested regulatory pattern deals effectively with inequity. Elements of protection from fraudulent activity and deceptive practice are included.

II. EXISTING PROTECTIONS AVAILABLE TO THE CONSUMER ARE INSUFFICIENT _____

low: Other regulated groups control access to practitioners. Existing remedies are in place and effective. Clients are generally groups or organizations with adequate resources to seek protection.

high: Individual clients access practitioners directly. Current remedies are ineffective or nonexistent.

III. NO ALTERNATIVES TO REGULATION WILL ADEQUATELY PROTECT THE PUBLIC _____

low: No alternatives considered. Practice unregulated in most other states. Current system for handling abuses adequate.

high: Exhaustive search of alternatives finds them lacking. Practice regulated elsewhere. Current system ineffective or nonexistent.

IV. REGULATION WILL MITIGATE EXISTING PROBLEMS ____

low: Little or no evidence of public benefit from regulation. Case not demonstrated that regulation precludes harm. Net benefit does not indicate need for regulation.

high: Little or no doubt that regulation will ensure consumer protection. Greatest protection provided to those who are least able to protect themselves. Regulation likely to eliminate currently existing problems.

V. PRACTITIONERS OPERATE INDEPENDENTLY, MAKING DECISIONS OF CONSEQUENCE ____

low: Practitioners operate under the supervision of another regulated profession or under the auspices of an organization which may be held responsible for services provided. Decisions made by practitioners are of little consequence.

high: Practitioners have little or no supervision. Decisions made by practitioners are of consequence, directly affecting important consumer concerns.

VI. FUNCTIONS AND TASKS OF THE OCCUPATION ARE CLEARLY DEFINED ____

low: Definition of competent practice unclear or very subjective. Consensus does not exist regarding appropriate functions and measures of competence.

high: Important occupational functions are clearly defined, with quantifiable measures of successful practice. High degree of agreement regarding appropriate functions and measures of competence.

VII. THE OCCUPATION IS CLEARLY DISTINGUISHABLE FROM OTHER OCCUPATIONS THAT ARE ALREADY REGULATED ____

low: High degree of overlap with currently regulated occupations. Little information given regarding the relationships among similar occupations.

high: Important occupational functions clearly different from those of currently regulated occupations. Similar non-regulated groups do not perform critical functions included in this occupation's practice.

VIII. THE OCCUPATION REQUIRES POSSESSION OF KNOWLEDGES, SKILLS AND ABILITIES THAT ARE BOTH TEACHABLE AND TESTABLE ____

low: Required knowledge undefined. Preparatory programs limited in scope and availability. Low degree of required knowledge or training. Current standard sufficient to measure competence without regulation. Required skill subjectively determined; not teachable and/or not testable.

high: Required knowledges clearly defined. Measures of competence both objective and testable. Incompetent practice defined by lack of knowledge, skill or ability. No current standard effectively used to protect public interest.

IX. ECONOMIC IMPACT OF REGULATION IS JUSTIFIED _____

low: Economic impact not fully considered. Dollar and staffing cost estimates inaccurate or poorly done.

high: Full analysis of all costs indicate net benefit of regulation is in the public interest.

EXHIBIT 3

STUDY OF THE PRACTICE OF LICENSED PSYCHOLOGISTS IN THE UNITED STATES AND CANADA

prepared for

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Acknowledgements

On behalf of Professional Examination Service (PES), we are pleased to have conducted this major research study for the Association of State and Provincial Psychology Boards (ASPPB). This report summarizes the practice of licensed/registered psychologists in the U.S. and Canada and explores the evolving nature of competence across the professional lifespan of the practitioner and provides the groundwork for its assessment.

Information included in this report came from the following sources: relevant literature in psychology as well as other professions regarding the assessment of competence; information from focus panels and independent reviews by subject-matter experts; a pilot survey and a validation survey of 5000 licensed/registered psychologists; and discussions with both regulators and educators.

A content-based approach was used to systematically delineate the content areas and knowledge base required for entry into independent practice. Those results represent a contemporary description of the *Scientific Knowledge* underlying the practice of psychology and provide the basis for developing defensible test specification for the Examination for Professional Practice in Psychology (EPPP). A process-based approach was used to systematically delineate competencies associated with five additional areas of competence: *Evidence-Based Decision Making/Critical Reasoning*; *Professionalism/Ethics*; *Assessment*; and *Intervention/Supervision/Consultation.* Those results are a key requirement for assessing evolving levels of competence, including validated behavioral exemplars of competencies required at entry into independent practice.

A project of this magnitude depends on the hard work and commitment of many professionals, and we are pleased to acknowledge their contributions to the final product. This study required a substantial investment of ASPPB's financial resources and personnel. PES endorses ASPPB's ongoing commitment to the continued development of an exemplary examination program as reflected in the EPPP as well as its forward looking approach to the assessment of competency.

We wish to recognize the enduring contributions of the ASPPB Practice Analysis Advisory Committee for the wisdom and direction it provided. Its four members—Emil Rodolfa, Ph.D., Chair; Greg Gormanous, Ph.D.; Joan Grusec, Ph.D.; and Catherine Yarrow, Ph.D.—and the ASPPB Executive Officer, Stephen T. DeMers, Ed.D., worked with us and supported our efforts throughout the conduct of the study.

The 12 members of the ASPPB Practice Analysis Task Force worked tirelessly through four face-to-face meetings; and numerous e-mail-based assignments and telephone conference calls in order to refine the content areas and knowledge statements; and draft, review and refine the competency clusters, competency statements, and behavioral exemplars. They approached each task with wisdom and wit, always willing to provide their own perspectives and listen to the views of others in order to articulate a clear, concise, and contemporary description of practice. We are indebted to Consuelo Arbona, Ph.D.; Nancy Gourash Bliwise, Ph.D.; Darcy Cox, Psy.D., R. Psych., ABPP-CN; Wil Counts, R.Ph., Ph.D.; Dennis Doverspike, Ph.D., ABPP; Kelly Ducheny, Psy.D.; John Hunsley, Ph.D.; Mary Pat McAndrews, Ph.D., C.Psych.; Morgan

Table 13
Major Area of Training by Country

	United States		Canada	
	n	%	n	%
Clinical Psychology	562	57%	84	45%
Clinical Child Psychology	63	6%	14	7%
Clinical Neuropsychology	30	3%	8	4%
Cognitive Psychology	6	1%	1	1%
Community Psychology	6	1%	1	1%
Comparative Psychology	0	0%	2	1%
Counseling Psychology	170	17%	26	14%
Developmental Psychology	11	1%	5	3%
Educational Psychology	10	1%	18	10%
Environmental Psychology	0	0%	0	0%
Experimental Psychology	5	1%	1	1%
Forensic Psychology	2	0%	0	0%
General Psychology/Methods & Systems	2	0%	0	0%
Geropsychology	3	0%	0	0%
Health Psychology	22	2%	2	1%
Industrial/Organizational Psychology	8	1%	0	0%
Neurosciences	1	0%	2	1%
Perception/Learning	2	0%	0	0%
Personality Psychology	2	0%	1	1%
Physiological Psychology/Psychobiology	3	0%	0	0%
Psychopharmacology	1	0%	0	0%
Quantitative/Mathematical/Psychometrics/Statistics	0	0%	0	0%
Rehabilitation Psychology	2	0%	0	0%
School Psychology	60	6%	17	9%
Social Psychology	4	0%	3	2%
Sports Psychology	0	0%	0	0%
Other	9	1%	2	1%
Total	984	100%	187	100%

Table 14
Current Major Area of Practice by Country

	United States		Canada	
	n	%	n	%
Clinical Psychology	449	47%	59	32%
Clinical Child Psychology	119	12%	22	12%
Clinical Neuropsychology	56	6%	14	7%
Cognitive Psychology	8	1%	0	0%
Community Psychology	8	1%	3	2%
Comparative Psychology	1	0%	0	0%
Counseling Psychology	94	10%	16	9%
Developmental Psychology	4	0%	3	2%
Educational Psychology	4	0%	10	5%
Environmental Psychology	0	0%	0	0%
Experimental Psychology	0	0%	0	0%
Forensic Psychology	51	5%	15	8%
General Psychology/Methods & Systems	0	0%	0	0%
Geropsychology	17	2%	0	0%
Health Psychology	46	5%	5	3%
Industrial/Organizational Psychology	14	1%	4	2%
Neurosciences	0	0%	0	0%
Perception/Learning	1	0%	0	0%
Personality Psychology	1	0%	0	0%
Physiological Psychology/Psychobiology	2	0%	0	0%
Psychopharmacology	2	0%	0	0%
Quantitative/Mathematical/Psychometrics/Statistics	1	0%	1	1%
Rehabilitation Psychology	6	1%	6	3%
School Psychology	40	4%	26	14%
Social Psychology	2	0%	0	0%
Sports Psychology	1	0%	0	0%
Other	35	4%	3	2%
Total	962	100%	187	100%

Respondents who indicated that they had been trained in an *Other* area were most likely to have trained in a combined program including two of the specifically delineated areas. Respondents who indicated that they were currently practicing in an *Other* area were most likely to indicate that they were in administration/management. U.S. respondents were more likely to indicate an *Other* area of training than Canadian respondents. Only one area—pediatric psychology—was specifically identified by more than two respondents.

Table 31 presents the self-described areas of expertise of U.S. and Canadian respondents. As can be seen, both U.S. and Canadian respondents were most likely to describe themselves as being experts in clinical psychology and in assessment/diagnosis/evaluation, and somewhat less likely to indicate clinical child psychology; counseling psychology; and treatment, intervention, and prevention. With very few exceptions, respondents indicated that they had expertise in one or more of each of the 57 specifically-delineated areas of expertise.

Table 31
Area(s) in Which Respondents Have Expertise by Country

	United States		Canada	
	n	%	n	%
Assessment/Diagnosis/Evaluation	454	46%	105	56%
Behavioral Psychology	68	7%	9	5%
Biological Bass of Behavior	16	2%	0	0%
Career/Vocational Psychology	15	2%	4	2%
Child Psychology	52	5%	18	10%
Clinical Child Psychology	180	18%	31	17%
Clinical Neuropsychology-Adult	84	9%	18	10%
Clinical Neuropsychology-Child	34	3%	7	4%
Clinical Psychology	488	50%	81	44%
Cognitive Psychology	35	4%	11	6%
Cognitive-Affective Basis of Behavior	24	2%	3	2%
Community Psychology	18	2%	3	2%
Comparative Psychology	0	0%	0	0%
Competency Assessment	9	1%	1	1%
Consultation	35	4%	2	1%
Consulting Psychology	14	1%	5	3%
Consumer Psychology	1	0%	0	0%
Counseling Psychology	123	13%	38	20%
Cross Cultural Studies/Issues	12	1%	2	1%
Developmental Psychology	17	2%	6	3%
Educational Psychology	15	2%	16	9%
Environmental Psychology	1	0%	0	0%
Ethical/Legal/Professional Issues	24	2%	4	2%
Experimental Psychology	3	0%	0	0%
Forensic Psychology	94	10%	21	11%
Gay/Lesbian Issues	27	3%	2	1%
General Psychology/Methods & Systems	4	0%	0	0%
Geropsychology/Aging	45	5%	2	1%

	United States		Canada	
	n	%	n	%
Growth and Lifespan Development	11	1%	2	1%
Health Psychology	106	11%	13	7%
Industrial/Organizational Psychology	19	2%	8	4%
Interdisciplinary Systems	0	0%	0	0%
Management	17	2%	2	1%
Marriage and Family Psychology	70	7%	9	5%
Mental Retardation/Developmental Disabilities	43	4%	5	3%
Multicultural Psychology/Ethnic minority issues	42	4%	2	1%
Neuroassessment	16	2%	2	1%
Neuroscience	5	1%	2	1%
Pain/Pain Management	35	4%	8	4%
Pediatric Psychology	38	4%	2	1%
Personality Psychology	14	1%	1	1%
Physiological Psychology/Psychobiology	3	0%	0	0%
Psychoanalysis	14	1%	1	1%
Psychology of Women	28	3%	1	1%
Psychopharmacology	16	2%	0	0%
Quantitative/Mathematical/Psychometrics/Statistics	6	1%	1	1%
Recently emerged areas (e.g., collaborative care)	9	1%	0	0%
Rehabilitation Psychology	22	2%	13	7%
Research and Evaluation	16	2%	7	4%
Research Methods and Statistics	24	2%	1	1%
School Psychology	73	7%	28	15%
Social and Multicultural Basis of Behavior	5	1%	0	0%
Social Psychology	3	0%	1	1%
Specialized Assessment Techniques	8	1%	2	1%
Sports Psychology	2	0%	0	0%
Substance Abuse	77	8%	4	2%
Treatment, Intervention, and Prevention	122	12%	35	19%

Comparisons between the self-described areas of expertise of recently and less-recently licensed/registered respondents are difficult to make in that newly licensed/registered psychologists may not have had sufficient opportunity to develop any additional areas of expertise.

PROOF OF SERVICE

STATE OF CALIFORNIA, CITY OF PASADENA,
COUNTY OF LOS ANGELES

I am employed in the City of Pasadena and County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 301 North Lake Avenue, Seventh Floor, Pasadena, CA 91101, and I am employed in the city and county where this service is occuring.

On September 24, 2013, I served the foregoing document(s) described as **Letter Brief of *Amicus Curiae* California Association for Behavior Analysis to the Court Dated September 24, 2013**, on all appropriate parties in this action, by the method stated.

1. If marked FAX SERVICE, by facsimile transmission this date to the FAX number stated to the person(s) named.

2. If marked EMAIL, by electronic mail transmission this date to the email address stated.

3. If marked U.S. MAIL or OVERNIGHT, by placing this date for collection for regular or overnight mailing true copies of the within document in sealed envelopes, addressed to each of the persons so listed, pursuant to Code of Civil Procedure section 1013(a)(3). I am readily familiar with the regular practice of collection and processing of correspondence for mailing of U.S. Mail and for sending of Overnight mail. If mailed by U.S. Mail, these envelopes would be deposited this day in the ordinary course of business with the U.S. Postal Service. If mailed Overnight, these envelopes would be deposited this day in a box or other facility regularly maintained by the express service carrier, or delivered this day to an authorized courier or driver authorized by the express service carrier to receive documents, in the ordinary course of business, fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sepember 24, 2013 at Pasadena, California.

Una Lee Jost

SERVICE LIST

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